MENTAL CAPACITY REPORT:
PRACTICE AND PROCEDURE
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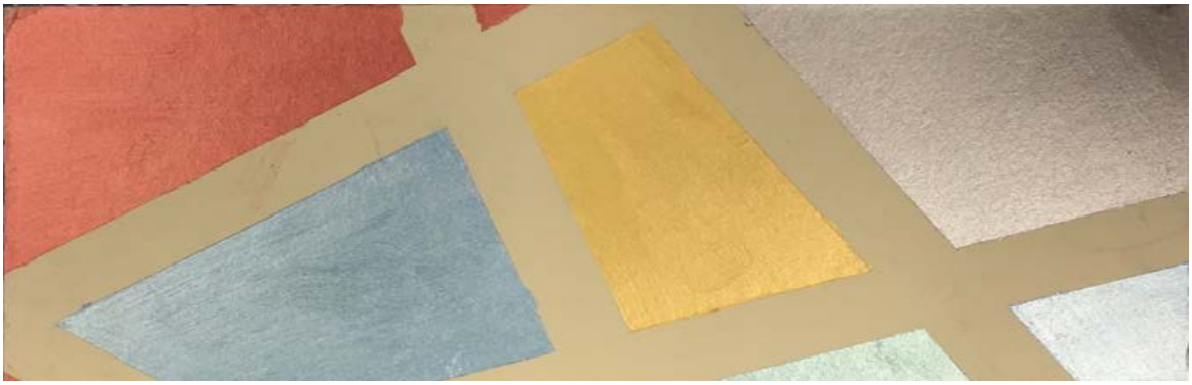

Welcome to the February 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: medical treatment dilemmas of different hues, how risky can the court be, and capacity in context;

(2) In the Property and Affairs Report: useful guides for those creating LPAs and an Australian take on balancing risk and (false) hope in the context of scamming;

(3) In the Practice and Procedure Report: medical evidence, mental disorder and deprivation of liberty, and the approach to propensity evidence;

(4) In the Wider Context Report: the new framework for care home visiting in England, an important consultation on capacity in civil litigation, new core ethics guidance from the BMA, and the Circuit Court rolls up its sleeves in Ireland;

(5) In the Scotland Report: discrimination narrowly avoided, and a case posing questions about compensation for unlawful detention.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

The sharp-eyed amongst you will have noticed that there was no third edition of the informal Court of Protection Law Reports series at the start of this year: this is because there will shortly be announced exciting news about their future – watch this space.

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Alex Ruck Keene KC (Hon)
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The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

Contents

Brian Farmer

Anyone who cares about the Court of Protection will – or should be – sad that Brian Farmer has retired as the (very) long-standing Press Association correspondent regularly to be seen lurking with a characteristic gleam in his eye around the Royal Courts of Justice. He brought to his reporting on the Court of Protection a real determination to convey matters accurately, and a willingness to go the extra mile to understand the context. He will be greatly missed.

Mental disorder, medical evidence and deprivation of liberty

Stockport MBC v KB [2023] EWCOP 58 (HHJ Burrows)

Article 5 – Practice and Procedure

Summary

In this case, HHJ Burrows addressed two questions in relating to 'community DoL' applications that have bubbled away for some time. As he noted at paragraph 2:

> *The first is whether, in order to satisfy the requirement under Article 5§1(e), namely that P suffers from "unsoundness of mind", the evidence upon which that conclusion is based has to say so in those terms? Secondly, whether the Court, either in its guise as a judge considering a COPDOL11 application on the papers, or via an application under the COP1 procedure, has to be in possession of evidence from a medical doctor?*

As set out by HHJ Burrows, the decision came against a backdrop of considerable difficulty on the part of the applicant local authority obtaining the requisite evidence from GPs. Some of their concerns related to the use of the term 'unsound mind.' Some of them were also concerned about their unwillingness to carry out an assessment they did not feel qualified to carry out. As HHJ Burrows noted at paragraph 15:

> *If the letter in response was going to be used in any way as a mental health assessment it was thought they would need to have been section 12 approved doctors under the MHA'83. In fact, s.12 MHA approval is relevant only to the process of authorising detention within that Act, often referred to as "sectioning". As the COPDOL11 form makes clear, s. 12 approval is not required for an assessment to be made in this process. Notwithstanding that, however, any clinician who does not consider themselves able to certify that a patient has a mental disorder or is "of unsound mind", must not do so.*

Further GP concerns were about the 'medico-legal' implications of putting their names to confirmations that a person is of unsound mind (HHJ Burrows, unfortunately, did not comment

upon the validity or otherwise of this concern), and, finally, that none of the three forms of standard contracts under which GPs operate oblige them to provide medical evidence to public bodies for Court of Protection applications (he could also have added that GPs fall outside the scope of those to whom s.49 applications can be directed).

HHJ Burrows summarised his conclusions at paragraph 2 thus:

> *(1) In the context of applications to authorise a package of care, which inevitably results in P being deprived of his or her liberty, the Court must be satisfied that P suffers from unsoundness of mind. However, these words have no mystical powers; they are not an "open sesame" giving access to the Article 5 cave. They refer to a mental disorder. It is for the court to be satisfied that P is of unsound mind on the basis of the evidence before it. Provided that evidence satisfies the Court that P has a mental disorder, and subject of course to the other essential requirements also being satisfied, the Court may authorise detention.*
>
> *(2) The European Court of Human Rights (ECtHR) jurisprudence is clear that "unsoundness of mind" has to be proved by those seeking to assert it on sound medical evidence. Usually that evidence will come from a medical doctor, generally a psychiatrist or General Practitioner. Whether, in appropriate circumstances that evidence could come from a psychologist, mental health nurse, or other similar specialist clinical expert may be a moot point. It is one I do not have to decide in this case. I simply direct that the Applicant needs to commission and instruct a registered medical doctor, either a psychiatrist or a GP, to review KB's case and provide a report dealing with her diagnosis as well as whether that condition causes her to lack capacity to make relevant decisions, as well as the likely duration of that condition.*

HHJ Burrows gave chapter and verse as to the reasoning underpinning his conclusions by reference to Strasbourg case-law, up to and including the Grand Chamber 'restatement' of the position in *Rooman v Belgium* [2019] ECHR 109, making clear that the key consideration was as to whether there was reliable evidence of mental disorder, rather than (for instance) the use by any clinician of the precise term 'unsound mind.' Further, as he put it at paragraph 31:

> *The word "medical" connotes that the evidence is of and pertaining to the science of medicine. It is clear to me that means a registered medical practitioner. There is no need to elaborate on that in this case. Here it means either a psychiatrist or a GP. Whether a wider net can be cast for other clinicians, such as clinical psychologists, learning disability nurses, or occupational therapists, may be a moot point. However, in this case the evidence needed is from a medical doctor.*

One observation that might give readers pause is HHJ Burrows's statement at paragraph 28 that "[o]*f course it is important to be clear… that the Court remembers that the mental disorder must be the cause of the mental incapacity*," as it could be read as suggesting that it is necessary for the capacity assessment to be carried out by a clinician. This is undoubtedly not the case, because it is entirely possible for assessment of whether the person has capacity to consent to the arrangements giving rise to their confinement to be carried out (for instance) by a social worker; so long, in such a case, as there is medical evidence that the person does, indeed, have a mental disorder.

Further, although it is entirely understandable that HHJ Burrows did not wish to wade into the debate about how wide a definition can be given to the word 'medical,' it is perhaps to be regretted that he did not, as it was an issue causing considerable discussion in the context of the (now aborted) moves towards implementation of the Liberty Protection Safeguards. We would have been interested in his take (even obiter) on in a later paragraph – 130 – in *Ilnseher v Germany* to that cited in his judgment, where the European Court of Human Rights said:

> *As for the requirements to be met by an "objective medical expertise", the Court considers in general that the national authorities are better placed than itself to evaluate the qualifications of the medical expert in question* […] *However, in certain specific cases, it has considered it necessary for the medical experts in question to have a specific qualification, and has in particular required the assessment to be carried out by a psychiatric expert where the person confined as being "of unsound mind" had no history of mental disorders* […] *as well as, sometimes, the assessment to be made by an external expert* […] (case citations omitted, emphasis added)

Short note: the approach to propensity evidence

Lancashire County Council v M & Ors [2023] EWHC 3097 (Fam) was decided in the Family Division, but the principles set out therein and below are equally applicable in the Court of Protection. In it, Hayden J Hayden considered an application in relation to two children, A and J, who were respectively aged 5 and 3. Care proceedings had commenced in 2019 due to A's exposure to domestic violence, and it was accepted that A's father (F) "*has consistently behaved in a violent and controlling manner towards the mother (M). He admits that when intoxicated by alcohol, he behaves violently and aggressively. His verbal abuse of M is particularly vituperative, calculated to belittle and demean her. F was convicted of an offence of battery of M in May 2021. This involved an incident of strangulation; it was met by a custodial sentence, which was suspended. Only a few months later, July 2021, there were further serious incidents between the couple. At the conclusion of the care proceedings, a Supervision Order was made, predicated on the assumption that the parents had separated. They had not*" (paragraph 1). M repeatedly reassured professionals that she and F were no longer living together, but F was living in the house throughout the relevant period. M and F had a third child, R, who died in 2021 due to apparent neglect while M and F were highly intoxicated. However, on post-mortem examination, R was found to have had a rib fracture which was consistent with non-accidental injury and likely required significant force consistent with squeezing or gripping the baby forcefully. The local authority applied for a care order in respect of A and J in 2022, and the hearing was to determine the issue of who had caused the injury. Neither parent suggested that the other had caused the injury, or accepted that they had caused the injury.

One of the issues the court considered was F's propensity towards violence. Hayden J noted that "[w]*hilst propensity for abusive behaviour, whether identified in psychological assessment, or predicated on previous behaviour, does not permit, without more, a conclusion that F was most likely to have inflicted the injury… What requires to be confronted is whether or to what extent, F's violent behaviour is incorporated into the broader evidential canvas which requires to be considered when identifying a likely perpetrator*" (paragraph 35).

After reviewing relevant criminal authorities, on propensity evidence, Hayden J noted that he referred to them "*not to suggest that the approach set out in the criminal jurisdiction is to be imported, in an identical manner, into the fact-finding process in family proceedings in precisely the same way (plainly, they cannot be), but merely to demonstrate that which I consider to be an essentially self-obvious proposition i.e., that if propensity evidence is potentially admissible in criminal law proceedings, it would be entirely illogical to exclude it from consideration in investigative proceedings in the family court. Moreover, and with the greatest diffidence and respect for Wall J* [*in CB and JB (Care Proceedings: Guidelines)* 1998] EWHC Fam 2000: [1999] 1 WLR 238]*, the starting point for consideration of the relevance of such evidence should not be hampered or distorted by a presumption that such evidence is "unlikely" to be of assistance. It will depend on the facts of the individual case*" (paragraph 42).

Hayden J considered that when applying propensity evidence in a Family rather than criminal court, "*the Judge will, invariably, be scrutinising a broad evidential landscape. Where the lodestar for the Court's approach is the paramountcy of the child's welfare, a very wide category of evidence will fall for consideration. This will include hearsay evidence, be it first or second hand, in documentary format or in oral evidence. It will also include expert opinion evidence. The standard of proof is, of course, the civil standard, requiring facts to be proved on the balance of probabilities*" (paragraph 43). [He concluded at paragraph 44: "[t]*he investigative process must track down ascertainable facts from the broadest canvas available and, where possible, draw such inferences as those facts will support. It is frequently a difficult task, but it is not one that can be shirked. The danger in failing to confront it is that an innocent individual may be tainted by a finding that has a direct impact, both on her and on the child. A finding which leaves a parent in a pool of potential perpetrators is likely to adversely influence the nature and extent of the contact arrangements or indeed, on where and with whom the child will live in the future. Of course, the imperative of child protection must not generate a reason to burden unsatisfactory evidence with a greater weight than it can legitimately support*."

Hayden J cautioned against overreliance on psychological assessment in propensity evidence:

> *The danger inherent in such evidence is now entirely recognised. As Wall J made clear, this opinion evidence, might easily be both prejudicial and wrong. Moreover, it trespasses on the function of the Judge in the assessment of adult credibility as to the responsibility for a child's injuries. This is, of course, entirely different from evaluating propensity generated by evidence of established behaviour.*

In the instant case, Hayden J found that the propensity evidence supported a finding that F had been the perpetrator. He also expressly read into the judgment the provisions of s.70 Domestic Abuse Act 2021 – introducing the offences on non-fatal strangulation and non-fatal suffocation – and the considerations that apply on sentencing, on the basis he considered (at paragraph 30): that "*they require to be far more widely known and understood by family law practitioners*" (and, we would add, those appearing before the Court of Protection).

Court of Protection statistics

The Court of Protection statistics between July and September 2023 have been published (part of the 'Family Court Statistics Quarterly: July to September 2023 ' . They can be found here, and show

- There were 1,655 applications relating to deprivation of liberty under the Mental Capacity Act 2005 made, which is an increase of less than 1% on the number made in the same quarter in 2022

- In July to September 2023, there were 9,956 applications made under the Mental Capacity Act 2005 (MCA), up by 10% on the equivalent quarter in 2022 (9,045 applications). Of those, 35% related to applications for appointment of a property and affairs deputy (Table 20). The report concludes that the reason for this increase is '*due to an aging population and an increase in the number of Lasting Power of Attorneys being made*.'

- In July to September 2023, there were 302,277 LPAs registered, the highest in its series and up 51% compared to the equivalent quarter in 2022.

For the first time, the report included the number of applications made to the High Court to deprive children of their liberty pursuant to the Court's Inherent Jurisdiction. The report notes that 388 such applications were made during the quarter. Most of these children were teenagers with 48% of them being between 13 and 15 years old and 27% being between 16 and 18 years old. The Nuffield Family Justice Observatory reports that this compares to 358 applications (incl. 5 repeats) over the same period last year.

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Alex has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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Arianna practices in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to Court of Protection Practice (LexisNexis). To view a full CV, click here.

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Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2022). To view full CV click here.

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Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click here.

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Simon Edwards: simon.edwards@39essex.com

Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Peter Edwards Law has announced its spring training schedule, here, including an introduction – MCA and Deprivation of Liberty, and introduction to using Court of Protection including s. 21A Appeals, and a Court of Protection / MCA Masterclass - Legal Update.

Adrian will be speaking at the World Congress of Adult Support and Care. This event will be held at the Faculty of Law of the University of Buenos Aires from August 27-30, 2024. For more details, see here.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in March. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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